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IN THE

Supreme Court of the United States

October Term, 1961.

No. 961

CHARLES CHRISTOPHER CAMPBELL, CHARLES WILLIAM LANG and THELMA ADELE ENSOR,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Charles Christopher Campbell, Charles William Lang and Thelma Adele Ensor, your petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above case on February 13, 1962.

OPINIONS BELOW.

The order of the Supreme Court of Pennsylvania denying allocatur (Appendix A, *infra*, p. 21) has not been officially reported. The opinion of the Superior Court of Pennsylvania (Appendix B, *infra*, p. 22) was reported in 196 Pa. Super. 386, 175 A. 2d 324 (1961). The opinion and order (Appendix C, *infra*, p. 32) of the York County Court have not been officially reported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania denying allocatur (Appendix A, *infra*, p. 21), was entered on February 13, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Where the trial court, under Pennsylvania law prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), prevented petitioners from developing the lack of probable cause for issuing the search warrant which was the basis of the arrest of the petitioners and of the seizure of evidence which led to their conviction, and where the Pennsylvania Superior Court, though recognizing that *Mapp* changed the Pennsylvania law, refused to grant a new trial because of the failure of the record to show illegality in issuing the warrant, were petitioners deprived of due process guaranteed by the Fourteenth Amendment?

2. Whether petitioners were deprived of due process of law guaranteed by the Fourteenth Amendment in being convicted without any evidence of their guilt of the crimes with which they were charged.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

The Pennsylvania Penal Code provides in pertinent part:

> "§ 4718. *Abortion.*
>
> Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both." PA. STAT. ANN. tit. 18, § 4718.

STATEMENT OF THE CASE.

Each petitioner was charged in a separate bill of indictment filed in the Court of Oyer and Terminer of York County, October Sessions, 1958, Nos. 158, 159 and 160, each bill containing three counts. Typically, the first count in one bill of indictment charged petitioner Campbell with unlawfully administering to three women, Elizabeth Troyer, Hazel Romaine Reed and Nancy Lou Reese, supposed and believed to be pregnant and quick with child, a certain drug and substance, with intent to procure the miscarriage of the three above-named women; the second count charged petitioner Campbell with administering to the same three women a certain poison, drug and substance with intent to procure their miscarriages; and the third count charged petitioner Campbell with unlawfully using a certain instrument and means upon, about and within the bodies of the same three women with intent to procure their miscarriages (9a-11a).[1] Each of the other two bills of indictment charged each of the other petitioners with the same offenses in identical language (11a-15a).

After a trial lasting two and a half days, the jury found each petitioner not guilty on each of the first two counts, but convicted each petitioner on the third count of his or her respective bill of indictment. Timely motions for new trial and in arrest of judgment were filed by each petitioner and were refused by the Court. Petitioner Campbell was sentenced to 1½ to 5 years imprisonment, plus costs of prosecution; petitioner Lang was sentenced to imprisonment in the York County Jail for eight months and to pay the costs of prosecution; and petitioner Ensor was given an indefinite sentence of imprisonment.

A petition for new trial, setting forth information discovered by counsel for petitioners subsequent to the trial, was filed on May 15, 1961 by all three petitioners (249a-

1. References followed by an "a" are to the Record printed for the Superior Court of Pennsylvania.

250a), and was refused by the Court on the same day without a hearing. Timely appeals were taken to the Superior Court of Pennsylvania which affirmed the convictions of all defendants but remanded in the case of petitioner Lang for correction of the sentence to include a minimum term. A timely petition for reargument was denied by that Court. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania.

The facts developed at trial largely through the testimony of Pennsylvania State Police officers were as follows. On the evening of November 21, 1958, several officers of the Pennsylvania State Police, armed with a search warrant, stationed themselves near a farm in York County (30a). The State Police allegedly had obtained the warrant on the basis of a complaint made by the owner of the property, referred to throughout the trial as "Colonel Hinkley". The information for the complaint was sworn to by State Police Officer Robert Smith before Alderman Fickes, who issued the warrant (62a-63a). The warrant does not appear in the record, and it is not shown whether the warrant authorized a search in the nighttime or was restricted to the daytime, nor is the scope of the warrant disclosed.[2] After observing two cars stop outside the house and the passengers enter the house, at about 7:40 p.m. (70a) the State Police entered the house using a key previously obtained from the owner of the premises. In the house they found petitioner Campbell sitting on a stool beside an operating table dressed in a white gown and cap, wearing a white mask and rubber gloves. One of the officers entered a bathroom where he saw petitioner Ensor taking off a white uniform. He ordered her to button it up again, and later that evening had her change into street clothes and took her uniform. Another officer went into a living room in the house and found petitioner Lang sitting there in ordinary street clothes. Throughout the house the officers found various

2. In fact, there was a prior search warrant which was not executed (67a).

surgical instruments and medical items as well as normal household items. In several rooms of the house five women were found, two in beds, one sitting on a bed dressed in a slip and two others fully clad. Four of these women were taken to the office of Dr. Hart who examined them. One of the four, a Commonwealth witness, Barbara Perry, had consulted Dr. Hart as a private patient some time previously. At the trial Dr. Hart testified that there was no evidence of surgical procedure in the region of the reproductive organs of Barbara Perry nor on one of the other women he examined, but that there was such evidence as to the other two women he examined.

All of the petitioners were interrogated at the State Police Barracks that evening, and one of the officers testified that petitioner Campbell signed a written statement that he had performed surgical procedures upon three women for the purpose of inducing abortion (172a-179a). In the statement Campbell did not identify the three women upon whom he had performed these acts. Petitioner Ensor, in a verbal statement to another officer, said that she was employed by Campbell as a secretary for 15 years, had training as a practical nurse, and that her duties were to administer to the general needs of the women who came to the house (184a-185a). Petitioner Lang, also in a verbal statement to that officer, said that he was employed by Campbell to work on one of the latter's farms as a carpenter, and that he had been instructed to pick up and transport two women to the house in which he was arrested, using back country roads (185a-186a). He said that he did not know why the women were being brought to the house, and did not know that abortions were being performed, although he had heard that Campbell was supposed to perform abortions.

None of the three women named in the indictment as alleged victims appeared or testified at the trial. The Commonwealth offered evidence that subpoenas had been issued for them but two were not honored and the third could not be served because the witness could not be found (195a-

196a). No effort was made by the Commonwealth to compel the appearance of any of these three women under the Uniform Attendance of Witnesses Act. Only one of the other women found in the house, a Barbara Perry, testified; she testified only that she had gone to the house and received an injection in the leg from petitioner Ensor (109a-118a). Much of the paraphernalia taken from the house was offered in evidence as were photographs of three women who were identified by some of the witnesses as being three of the women found in the house on the night in question. Also, one of the officers had induced petitioner Campbell to put on a gown and mask and had taken his picture, which was also offered in evidence.

During the trial, which took place prior to the decision of this Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), defense counsel attempted to cross-examine the State Police officer upon whose complaint the search warrant was issued, to determine whether there was probable cause for issuance of the warrant. The trial judge ruled that defense counsel could not attack the search warrant, and permitted him to proceed with cross-examination only on the question of whether there was bias or prejudice (62a-69a).

After their conviction and denial of motions for new trial and in arrest of judgment, petitioners filed a petition for new trial alleging that the three women named in the indictment and who had not appeared at the trial, had given affidavits stating that none of the petitioners had committed any acts of abortion upon them, and the petition alleged willingness to take depositions of those witnesses at the cost of the petitioners (249a-250a). The petition also alleged that petitioners had learned that Colonel Hinkley was not in the jurisdiction of the court at the time that the alleged complaint which was the basis of the search warrant had been made to the York Substation of the State Police. This petition was denied without a hearing (7a).

REASONS FOR GRANTING THE WRIT.

At the trial of this case, which took place prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), the trial court applied existing Pennsylvania law, which admitted illegally obtained evidence, in ruling that defense counsel could not inquire into the question of whether probable cause existed for issuing a search warrant which was the basis for the arrest of the petitioners and the seizure of evidence which led to their convictions. On appeal, after the *Mapp* decision had been announced, the Pennsylvania Superior Court concluded that although the decision of this Court in *Mapp* changed Pennsylvania law, it was inapplicable since no illegality in obtaining the search warrant was shown. However, it is apparent from the record that defense counsel's attempt to show illegality was blocked by the ruling of the trial court, which was proper under existing law but which has now been changed by this Court's decision in *Mapp*. This case thus presents the question of whether the appellate court's decision here conflicts with or improperly evades this Court's decision in *Mapp*, and thus denies petitioners due process guaranteed by the Fourteenth Amendment. Appellate courts in other states have reached different conclusions in passing on this question, which is of paramount importance in the application of the constitutional protection accorded by the *Mapp* interpretation and in the administration of justice in the state courts. This Court should, accordingly, grant certiorari to settle this conflict.

Additionally on two recent occasions this Court has emphasized that it is a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. Louisville*, 362 U. S. 199, 206 (1960); *Garner v. Louisiana*, — U. S. —, 7 L. ed. 2d 207, 213 (1961). In the case at bar, the state courts have sustained convictions of three individuals without the slightest shred of evidence of their guilt of the specific crime charged. Accordingly, this Court should grant certiorari to prevent a gross miscarriage of justice.

ARGUMENT.

1. Petitioners Were Deprived of Due Process of Law in That the Trial Court, Under Then Existing Pennsylvania Law, Which Admitted Illegally Seized Evidence, Prevented Petitioners From Attacking the Illegality of a Search Warrant, and the Pennsylvania Appellate Court, Even after *Mapp v. Ohio*, Refused a New Trial or Hearing on This Issue.

The case at bar was tried in October, 1960, eight months prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), in which this Court held that evidence obtained by unreasonable search and seizure in violation of the Fourth Amendment, made applicable to the States through the due process clause of the Fourteenth Amendment, is inadmissible in a state court. Prior to this decision in Pennsylvania evidence obtained in violation of an individual's constitutional rights could have been admitted in evidence against him. The trial court so concluded (259a), citing *Commonwealth v. Gambrone*, 183 Pa. Super. 283, 130 A. 2d 254 (1957). The Superior Court specifically agreed, and also specifically noted that *Mapp* changed Pennsylvania law in this respect (Appendix B, *infra*, 25).

Despite the Pennsylvania law at the time of the trial, defense counsel did attempt to cross-examine the State Police officer who had applied for and obtained a search warrant for the premises, pursuant to which the State Police entered the premises, arrested petitioners, and obtained evidence and statements which were introduced at the trial and which led to the convictions of petitioners. Defense counsel futilely attempted to determine whether probable cause existed for the issuance of the warrant. Counsel was prevented by the ruling of the trial court from pursuing this line of questioning, and was restricted to cross-examining the officer to determine his bias or prejudice (62a-69a).

The issue of the validity of the warrant was again raised by counsel in the motion for new trial but was rejected on the basis of Pennsylvania law at that time, which was still prior to the *Mapp* decision (259a). After sentence and before the appeal was argued, this Court decided *Mapp;* counsel again raised the issue on appeal. The Pennsylvania Superior Court simply concluded that the *Mapp* decision was inapplicable since defense counsel had failed to show illegality in issuing the search warrant (Appendix B, *infra*, 26).

It is quite apparent that the failure of proof relied upon by the Superior Court resulted solely from the ruling of the trial court—which may have been correct at that time, but which became incorrect prior to completion of the appeal because of the *Mapp* decision. Although there had been no motion to suppress the evidence filed before trial, such a motion would have been futile under then existing Pennsylvania law, as recognized by the trial court and Superior Court. Even under that state of the law, defense counsel attempted to develop by cross-examination that the State Police officer who had obtained the search warrant had not even talked to the owner of the premises, Colonel Hinkley, who had allegedly made the complaint upon which the warrant was based (63a-64a); he was prevented from doing so by the trial court's ruling. This is rendered even more significant by the allegation in the motion for new trial filed after the trial (still prior to *Mapp*) and denied by the trial court without hearing, that Colonel Hinkley was not even in the jurisdiction at the time that the alleged complaint had been made to the State Police (250a). This allegation alone could be interpreted as a showing of illegality; at any rate, the failure to develop it further can not be charged to any fault of petitioners, but to the rulings of the trial court.

This court has not yet announced whether the *Mapp* decision is to have retrospective effect. It seems clear that the *Mapp* decision was not a change in organic law to be

applied only prospectively; it was an interpretation of the constitutional provision which reads the same after the *Mapp* decision as it did before. Thus, while the trial court may have correctly applied the state law as interpreted at the time of the trial, the *Mapp* decision declares that the state courts' interpretation was wrong. In the case at bar, the state appellate courts had the opportunity to correct such mistake prior to the final decision in the pending case. This Court certainly can still correct that mistake to prevent a manifest injustice. *Cf. Griffin v. Illinois*, 351 U. S. 12 (1956).

In the case at bar there is no collateral attack on a conviction after the judgment has been affirmed, as was the situation in *Hall v. Warden, Maryland Penitentiary*, 201 F. F. Supp. 639 (D. Md. 1962) (federal habeas corpus proceeding). On the contrary, this Court is being asked to review the refusal of the state appellate courts to apply the *Mapp* doctrine to a case in which the judgment has not yet become final. The majority of the Court of Appeals of New York decided that the *Mapp* rule is to be applied in its review of pending appeals from pre-*Mapp* convictions. *People v. Loria*, 223 N. Y. S. 2d 462 (1961), where *Mapp* was decided after an intermediate appellate court had sustained the conviction, and the Court of Appeals still reversed. In *Commonwealth v. Spofford* — Mass. —, 180 N. E. 2d 673 (1962), the Supreme Judicial Court of Massachusetts unanimously came to the same conclusion. Also see *State v. Valentin*, — N. J. S. —, 174 A. 2d 737 (1961), where the New Jersey court came to a similar conclusion.

In *Spofford*, the court reversed the conviction and granted judgment for the defendants because the record showed the search and seizure to be unreasonable. In *Loria*, where the record demonstrated that the search and seizure had been made without a warrant the New York court granted a new trial but expressly reserved to the People the right to establish the propriety of the entry into the house in question. Similarly, in *Valentin* where the New Jersey court could not determine from the record whether

the search and seizure were reasonable, the matter was returned to the lower court. In the case at bar, the least that should have been done to comply with the mandate of this Court in *Mapp* is to have returned the matter to the trial court for a new trial or hearing at which the validity of the search warrant could be determined. Distinguishable is *Shorey v. Maryland*, — Md. —, 177 A. 2d 245 (1962), where the Maryland court sustained a pre-*Mapp* conviction on the ground that no objection had been made at the trial to the arrest of defendant nor to the use of the evidence obtained pursuant thereto.

Accordingly, this Court should grant certiorari to review the Pennsylvania Superior Court's decision, and the Pennsylvania Supreme Court's acquiescence therein, which conflicts with and evades this Court's decision in *Mapp*, and to establish a guide-post for state courts in the application of that decision.

2. Petitioners Were Deprived of Due Process of Law in Being Convicted Without Any Evidence of Their Guilt of the Crimes Charged.

A. Failure to Produce Victims of Alleged Crime.

All three petitioners were identically charged with committing acts of abortion on three named women—Elizabeth Troyer, Nancy Lou Reese and Hazel Romaine Reed. At the trial, the Commonwealth's evidence showed that five women had been found in the farm house. Only one of these, Barbara Perry, appeared at the trial and was identified by the other witnesses as having been at the farm house, as she admitted in her own testimony. However, she was unable to identify any of the other women who had been at the farm house. Only four of the women, including the witness Barbara Perry, had been taken to Dr. Hart for physical examination after the raid. His examination showed that as to only two of the women—not including Barbara Perry—was there any evidence of the insertion of tampons or surgical procedures in their reproductive areas. There was

no evidence of such insertions or surgery on Barbara Perry nor on one of the other women.

To sustain the convictions under the indictments as drawn, it was vital for the Commonwealth to prove two elements: that acts of abortion had taken place, and that those acts had been committed *on the persons named* in the indictment. It would not be sufficient to show that acts of abortion had been committed on persons other than those named in the indictment—it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction. *Garner v. Louisiana*, 7 L. ed. 2d at 214; *Thompson v. Louisville*, 362 U. S. 199, 206 and cases cited at footnote 13; *cf. Cole v. Arkansas*, 333 U. S. 196 (1948).

Here the Commonwealth totally failed to produce any evidence that the acts of abortion were committed on the persons named in the indictment. The Commonwealth totally failed to prove that the two women who, according to Dr. Hart showed signs of have been subjected to abortion attempts, were two of the persons named in the indictment.

There was no direct evidence of acts of abortion committed on any individual. No one testified that they had observed any of the petitioners insert any tampons nor perform any surgery upon any woman. Nor did any of the women named in the indictment appear and testify that any act of abortion had been committed upon them.[3] The Commonwealth attempted to prove its case solely by circumstantial evidence. It offered the testimony of police officers that they had found five women in the farmhouse, and had taken four of them to Dr. Hart for examination. Dr. Hart testified that two of them (Nancy Reese and Ann Troyer) showed evidence of having been subjected to surgical procedures in the reproductive area, although as to the

3. In fact, the motion for new trial on the basis of after-discovered evidence alleges that affidavits had been obtained from those persons named in the indictment swearing that no acts of abortion had been committed upon them by these petitioners (249a).

other two (Barbara Perry and Hazel Reed) he testified that in his opinion no act of abortion had been performed. However, Dr. Hart did not know any of these individuals personally; the only evidence offered tending to show that the women examined by Dr. Hart were those designated in the indictment was his hearsay testimony that the women had identified themselves by the names designated in the indictment, and Dr. Hart's identification of pictures of the women he had treated. There was no showing that these were their true names nor that the women whose pictures he identified were the women named in the indictment.

At the trial the Commonwealth attempted to explain its failure to produce these women by showing that subpoenas had been issued for all three; Troyer and Reed were served in Baltimore, but Reese could not be found (195a-196a). However, no attempt was made to force their attendance under the Uniform Subpoena of Witnesses Act. In addition, these women had been held by Alderman Fickes under $1,000.00 bail each but there was no showing of any attempt to procure their attendance under these bonds.

At the close of the trial defense counsel requested that the trial court charge the jury that failure of the Commonwealth to produce the alleged victims or to adequately explain their failure to do so gives rise to an inference that their testimony would be unfavorable to the Commonwealth. The Court so charged as to the failure of the Commonwealth to produce or explain the absence of two of the women, Reed (upon whom admittedly no abortion was committed) and Troyer. However, the court told the jury that the rule would have no application as to Reese, since the court concluded that there had been an unsuccessful attempt to locate her. What would ordinarily be an evidentiary ruling, not of the type this Court would normally review, nonetheless had far-reaching due process implications, since defense counsel later obtained from all three women affidavits that none of the appellants had ever committed acts of abortion upon any of them. This was set out in the motion for

new trial filed by defense counsel and denied without a hearing at the time of sentencing. The failure of the Commonwealth to call these witnesses thus deprived petitioners of an opportunity to develop this at trial.

There can be no disputing the proposition of law, suggested by the prosecution and relied upon by the Pennsylvania Superior Court, that the Commonwealth is under no duty to call all of the eyewitnesses to a crime, particularly where the district attorney may have reason to believe that such eyewitnesses are unreliable. However, in the case at bar, the women named in the indictment and upon whom the acts of abortion are alleged to have been performed were the *only* eyewitnesses to the alleged crime—and their affidavits say that there was no crime committed upon them. This is thus not a situation where the eyewitnesses are expected by the Commonwealth to be unreliable—here the eyewitnesses, the victims of the alleged crime, would prove that no crime had been committed. Accordingly, the failure of the Commonwealth to produce these individuals named in the indictment as victims not only amounted to a suppression of evidence favorable to the defense, but left the record devoid of *any* competent evidence of the alleged crime.

The alleged admissions of the petitioners did not supply the missing evidence. In a written statement offered into evidence by the Commonwealth, petitioner Campbell allegedly admitted performing a "D and C;" dilating the cervix and scraping the uterus, for the purpose of an abortion, on three women. However, in that statement petitioner did not—nor was he asked to—identify the women upon whom he admitted performing the acts. There is absolutely no proof offered in the case to show that the women upon whom he allegedly had admitted committing the acts were the three named in the indictment. In fact, the Commonwealth's own evidence compels a different conclusion—since the evidence shows that there were only two women upon whom any acts of abortion could have been committed. Thus, the prosecution itself contradicted the

alleged admissions to be unreliable. Furthermore, the affidavits of the three women named in the indictment offered in the motion for new trial demonstrate the alleged admissions to be inapplicable to them. Nor do the alleged oral statements of petitioners Lang and Ensor supply proof of acts of abortion on the three named individuals.

Furthermore, it is too elementary for citation that a confession is not admissible without proof of the corpus delicti. See *Commonwealth v. Dolph*, 164 Pa. Super. 415, 65 A. 2d 253 (1949), and cases cited therein. Here, without any direct evidence that any acts of abortion had been committed upon the women named in the indictment or, for that matter, upon any other women, petitioner's alleged confession cannot supply that element of the corpus delicti. Petitioner Campbell's alleged confession may give rise to a belief that he had committed some crime; however, it does not show that he committed the specific crime charged in the indictment. The requirements of due process will not permit a conviction to stand on the basis of evidence which does not support the charge in the indictment, even if the evidence shows the existence of another crime not charged in the indictment. See *Stirone v. United States*, 361 U. S. 212 (1960); *United States v. Carabasi*, 292 F. 2d 362 (3d Cir. 1961).

Accordingly, these petitioners have been convicted without the slightest proof of their guilt of the crime charged, and this Court should grant certiorari in order to prevent a manifest injustice and denial of due process.

B. Failure of the Evidence to Implicate Appellants Lang and Ensor.

Petitioners Lang and Ensor were charged, identically with petitioner Campbell, with wielding the instrument or means utilized for procuring the miscarriages. But there was absolutely no evidence—and the Commonwealth did not contend—that petitioners Lang or Ensor had themselves performed any operation or performed any acts of

abortion. The only evidence offered against Lang was that he had been employed by Campbell for three and a half years as a carpenter on one of the latter's farms, and that he had been instructed by Campbell to pick upon and transport two women to the house where the arrests were made, using back country roads. The record is devoid of any evidence that the women he transported were the ones named in the indictment; in fact, there is evidence that one of the two was Barbara Perry, not named in the indictment and upon whom admittedly no abortion was performed. Lang's alleged admission that, although he did not know that there were abortions being performed, he had heard that Campbell performed abortions cannot supply the proof necessary to sustain the charge against him. Not only were the admissions inadmissible because of the failure of proof of corpus delicti, but they utterly failed to prove Lang's knowledge of and interest in the outcome.

Similarly, the only evidence offered against Ensor was that she had been employed by Campbell for many years, that she had training as a practical nurse, and that her duties were to administer to the general needs of the women who came to the farmhouse. Ensor's alleged admission that she administered to the needs of the women, and that she knew that Campbell performed acts designed to procure abortions, would likewise not supply the missing proof.

Since the prosecution did not attempt to show that these two petitioners performed the acts of abortion, nor were they charged with conspiracy,[4] Lang and Ensor could be convicted of the substantive offense only if they were aiders and abettors of the principal felon. It is too clear for extended citation that to be an aider and abettor there must be more than knowledge of the intended crime and criminal

4. It is obvious that petitioners could not be found guilty of the substantive offense of abortion if the proof were merely sufficient to show a conspiracy, as seems to have been the theory of the trial court set forth in its opinion sustaining the conviction of these two petitioners (260a).

intent: there must be advance notice of the scheme and approval of it; the accused must join in the commission of the crime and become an active partner in the intent which is the crime's basic element. See *Commonwealth v. Thomas*, 357 Pa. 68, 53 A. 2d 112, 114 (1947); *Commonwealth v. Giovangtti*, 341 Pa. 345, 354, 19 A. 2d 119, 123 (1941). Yet in the case at bar not only was there not an iota of evidence offered to show that Lang and Ensor knew of Campbell's plans or scheme, nor that they had any interest or stake in the outcome, the jury was not even instructed on the definition of aiding and abetting nor on the essential elements requisite for sustaining convictions under that theory. The trial judge gave to the jury no guide posts in determining whether these petitioners were guilty. As to Ensor, the Court charged only that if the jury believed that she administered to the needs of the girls, then she would be equally guilty with Campbell. Since she had admitted this, there was no doubt as to the jury's verdict. Yet there was no evidence to sustain her conviction. As to Lang, the Court instructed that if the jury should believe that he transported the women with knowledge that his act was a part and parcel of the whole operation, then he would be equally guilty. But again, there was no evidence to sustain his implication in the scheme.

It is respectfully submitted that the instructions fell far short of the trial judge's responsibility to instruct on the applicable law, so that it would constitute fundamental error, whether or not there was a request for proper instruction. See *United States v. Currens*, 290 F. 2d 751, 759 (3d Cir. 1961); *Barry v. United States*, 287 F. 2d 340, 341 (D. C. Cir. 1961). On the instruction as given a jury could find guilty a taxi driver with no interest or stake in the outcome merely if he knew the type of establishment to which he drove his passenger. On that charge the jury could also find guilty a doctor or nurse who might try to heal or help a woman upon whom they knew an abortion had been committed, even if they had not the slightest interest or stake

in the illegal operation and even if they heartily condemned such conduct. Such a result would be absurd. But in the case at bar, because of such instruction, the outcome was not in doubt even though there was not the slightest evidence offered to show that Lang and Ensor had any knowledge of or interest in the illegal operation. Accordingly, the Court should grant certiorari to determine whether these petitioners have been deprived of due process by conviction without a shred of evidence as to their guilt of the crimes with which they were charged.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant a writ of certiorari to review the due process objection and to settle a question of great importance to the administration of justice and the implementation of the constitutional interpretation of this Court.

Respectfully submitted,

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APPENDIX A.

Order of Supreme Court of Pennsylvania on Petition for Allowance of Appeal.

2/13/62. Petition denied.

PER CURIAM.

APPENDIX B.

Opinion of Superior Court of Pennsylvania.

(Filed: November 16, 1961)

By Montgomery, *J.*

The three appellants were indicted separately under section 718 of the Act of June 24, 1939, P. L. 872, 18 P. S. 4718, and were convicted on the third count only, of unlawfully, willfully, and feloniously using a certain instrument and means, the nature of which instrument and means was unknown, upon certain women with the intent to procure miscarriage of them.

The Commonwealth presented all of the evidence that was offered in the case. All three defendants elected not to testify nor to offer any other evidence on their behalf.

The Commonwealth's evidence discloses the following factual situation. On the evening of November 21, 1958, the Pennsylvania State Police, armed with a search warrant, stationed themselves near a house located in Heidelberg Township, York County, observing the approach of two cars, whose drivers and passengers entered the house. A few minutes after these people entered the house the State Police entered by using a key which they had previously obtained from the owner of the premises and, upon entering, observed appellant Campbell sitting on a stool beside an operating table and dressed in a white surgical gown and cap, a pair of rubber gloves on his hands, and a surgeon's mask tied around his face.

Appellant Ensor was found removing a white uniform similar to that worn by nurses. Appellant Lang was sitting in an adjoining room in ordinary street clothes. In the several rooms of the house two women were found in beds, another one sitting on a bed dressed in her slip, and two

others fully clad. In the room where appellant Campbell was seated, in addition to the operating table, the officers found various surgical instruments, gauze, drugs, and other medical items.

The two women who were found occupying the beds, and the one in her slip, were taken to the office of Dr. Thomas Hart, where they were examined by him. His examination disclosed evidence of surgical procedure in the region of the reproduction organs of two of the women, Nancy Reese and Elizabeth Troyer, but not on the third girl, Hazel Reed. One of the other women, Barbara Perry, a Commonwealth witness, had consulted Dr. Hart as a private patient sometime previously. Dr. Hart had diagnosed that she was in a pregnant condition, but it was not contended that any abortion had been performed upon her.

Appellants were all interrogated that evening, at which time the appellant Campbell signed a written statement in which he said he had been performing surgical procedures upon women for the purposes of inducing abortion or miscarriage, explaining in detail the occurrences of that particular evening, and that he received a fee of $200 for each operation.

Appellant Ensor, in a verbal statement to the police, said that she was employed by Campbell; that she had training as a practical nurse; that her duties were to administer to the general needs of the women who came to the house.

Appellant Lang said that he had heard Campbell was performing abortions; that he was employed by Campbell to work on his farm, and that on the particular evening in question he had been instructed by Campbell to pick up and transport two of the women to the house, using back country roads.

Appellants' first contention is that they were denied their constitutional rights to a fair trial by the failure of the Commonwealth to produce the alleged victims of the abortions, and by the withholding of evidence that they would not testify for the Commonwealth. Although the

Commonwealth must try a case fairly, and the district attorney is not a "vindictive seeker for vengeance", the calling of witnesses is within the discretion of the district attorney under the general supervision of the trial judge. The Commonwealth is not obliged to call all eyewitnesses in a criminal prosecution, nor a particular eyewitness, where the district attorney has reason to believe that the eyewitness is unreliable. Commonwealth v. Horn, 395 Pa. 585, 150 A. 2d 872; Commonwealth v. Palermo, 368 Pa. 28, 81 A. 2d 540; Commonwealth v. Repyneck, 181 Pa. Superior Ct. 630, 124 A. 2d 693; Commonwealth v. Lomax, 196 Pa. Superior Ct. 5, 173 A. 2d 710.

In the instant case these women were not victims in the adverse sense of the word but, rather, individuals who had voluntarily undertaken to have an abortion performed upon them. Such a person is described not as an accomplice or particeps criminis, but *rather* as the victim. Snyder Appeal, 189 Pa. Superior Ct. 13, 149 A. 2d 666; Commonwealth v. Sierakowski, 154 Pa. Superior Ct. 321, 35 A. 2d 790. Under these circumstances their reliability in testifying would certainly be questionable. Subpoenas were issued for three of the women, two of which were not honored, and the third of which could not be served because the witness could not be found. The defense was fully aware prior to the trial and again informed the first day of the trial that the Commonwealth would not call these witnesses if they did not voluntarily appear upon subpoena; and there was nothing to prevent the defense from calling them if their testimony was to be adverse. The lower court did inform the jury that they could consider the testimony of the two witnesses who were served and failed to appear to be adverse to the Commonwealth, but refused to instruct that the witness who could not be found would also be adverse. It is argued that the court's refusal to so charge as to the third one was prejudicial error. We see no error in this unless it be in giving the defendants the benefit of having the jury draw an unfavorable inference from the absence of the two

girls who were served. These witnesses were available to both the Commonwealth and the defendants. The Commonwealth had no particular control over any of them; and it has been pointed out previously that such persons might reasonably be expected to testify for the defendants and not the Commonwealth. Under these circumstances the rule has no application. Commonwealth v. Black, 186 Pa. Superior Ct. 160, 142 A. 2d 495.

Aside from the statements of the defendants, other evidence presented by the Commonwealth shows unequivocally that two abortions, or attempts to commit two abortions, had taken place. We conclude therefore, that there was no abuse of discretion on the part of the trial judge in concluding the cases without insisting on the appearance of these witnesses, and that there has been no violation of any of defendants' rights. We think it also significant that the defendants, at no time during the trial, requested the presence of these witnesses or the enforcement of the subpoenaes that had been served upon them.

Appellants further contend that they were deified their constitutional rights by the lower court's refusal to permit counsel to cross-examine on the question of the probable cause for issuance of the search and seizure warrant.

At the time of the trial and prior to the recent decision of the Supreme Court of the United States in Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, which prohibited state courts from admitting into evidence any matter which was obtained by an unlawful search and seizure, Pennsylvania had as its rule that even though a search warrant was illegally issued, it did not affect the admissibility of evidence obtained under it. Consequently, when the court below ruled that the defense counsel could not cross-examine on the question of probable cause or issuance of a search warrant, it correctly applied the existing law. Appellants admit this, but claim that in light of the complete change in the law the lower court should be reversed and a new trial granted. This contention would be meritorious if illegality in obtain-

ing the search warrant had been shown. However, there is nothing in the record to show illegality. During the course of the trial, counsel for defense, in his cross-examination of the police officer who obtained the warrant, indicated that he was not attacking its legality but was merely attempting to show bias. The officer indicated that the complaint was made on behalf of the owner of the premises. The questions of counsel elicited no showing of illegality, or for that matter bias or prejudice, in the obtaining of the search warrant. Therefore, the change in the law effected by Mapp v. Ohio (supra) is not applicable.

The appellants further contend that the lower court committed prejudicial error in its ruling on the admissibility of certain evidence. Firstly, the court's admission of a large quantity of photographs and alleged abortion paraphernalia was cumulative. The extent or size of the quantity of evidence produced and admitted cannot be said to be prejudicial unless it was so repetitive that it could possibly sway the jury in its determinations. The Commonwealth followed up each item with testimony and attempted to coalesce them, presenting the complete picture to the jury. As the learned judge in the court below pointed out, while it may not have been necessary for the Commonwealth to introduce all of the exhibits that it did, such as everyday household items, the appellants were not prejudiced thereby.

Secondly, appellants objected to the admission of posed photographs of appellant Campbell, claiming that when the police photographers had Campbell submit to various poses including the raising of his surgical mask, it constituted a re-enactment of the crime. In Commonwealth v. Johnson, 368 Pa. 139, 81 A. 2d 569, relied upon by the appellants, it was held to be error for the court to admit into evidence photographs for which the defendant had been made to pose at the instance of the police. However, we are in agreement with the lower court that the instant case is not factually similar to the Johnson case and can be readily distinguished. In the Johnson case the defendant was not apprehended for

six months after the crime, and when taken to the scene of the crime he posed for certain photographs indicating his activities in the commission of the crime. Here, the photographs were taken immediately after the officers had entered the premises where they found appellant Campbell seated in the position shown in the photograph; and evidence indicated he had remained in this position. The only thing the police requested was that he replace his surgical mask in the position it was when they had entered.

Admission of photographs and their use rests largely in the trial judge's discretion. Commonwealth v. Sydlosky, 305 Pa. 406, 158 A. 154; Commonwealth v. Winter, 289 Pa. 284, 137 A. 261; Commonwealth v. White, 160 Pa. Superior Ct. 522, 52 A. 2d 360. In Commonwealth v. Carelli, 281 Pa. 602, 127 A. 305, it was held that where a defendant actively participates in the reproduction of the circumstances and of the location of the parties at the time and place of the crime, a photograph then made is admissible in evidence although taken more than one month after the occurrence.

In the Johnson case the Court did not distinguish the Carelli case or recite any other precedents. The basis for its holding of inadmissibility was that such photographs of the defendant, pointing to what he had actually done, would be likely to impress a jury to such an extent as to virtually preclude the possibility of acquittal. However, in the Carelli case, where the photograph showed the position of the defendant and the setting at the time of the crime, and even more so in the present case where the photographs merely show the scene as it was at the time of the arrest, the pictures themselves do not portray a re-enactment of the commission of the crime but rather elucidate and corroborate the testimony. Error will not be predicated on the admission of such exhibits, unless there is a flagrant abuse of discretion, and none is apparent here.

Thirdly, the appellants contend the admission of the opinion-evidence of the physician-witness was error. It is clear from the testimony that the physician-witness was not

merely testifying as an expert witness who would be entitled to give his opinion on an assumed state of facts, but he was testifying as to what his personal examination of the women disclosed when they were brought to him by the police. His examination of the women was not made for the sole purpose of qualifying him as a witness, but also for medical reasons to determine whether their health was affected. He administered medicine to them and prescribed further medications. His testimony consisted of a description of the physical condition of the women, stating certain opinions based on his examination. Under these circumstances, he was clearly competent to give his medical opinion. Commonwealth v. Neill, 362 Pa. 507, 67 A. 2d 276.

Fourthly, the appellants contend that it was prejudicial error for the lower court to fail to charge the jury on the identity of the victims of the abortions, since the Commonwealth's testimony indicated that there were five women found on the premises and that only two of them, in the opinion of the physician, had been aborted. The identity of the victims was clearly in evidence from the testimony of the police officers and the physician who saw all of the alleged victims. Although appellant Campbell did not identify the victims, the physician testified as to the abortions having been performed with no interim period having passed between the time they were picked up in the presence of Campbell and the time he examined them. It should have been clear to the jury from the testimony and from the charge of the court exactly what had happened. If there was any error in the lower court's failure to identify the victims, it certainly cannot be held to be prejudicial to the appellants.

Other alleged errors in the charge, in addition to those previously discussed, relate to (1) the effect of the testimony of Dr. Hart; (2) the effect of the testimony of Barbara Perry. Particular objection is made to the sentence, "Now, if you believe that testimony (relating to Dr. Hart's finding of evidence of surgical interference on two of the

girls but not on the third), . . . then all three of these defendants would be guilty of the offense." A reading of the charge clearly shows that this sentence alone is taken out of context and must be read in connection with other parts of the charge. Dr. Hart was referring to his examinations. As to the Reed girl, who showed no evidence of surgical action, the court said, ". . . no conviction of any of these defendants could be sustained with regard to anything that allegedly was done with regard to her. . . . With regard to the other two, of course, you have entirely different situation." Then he proceeds to make the statement previously mentioned to which defendants object, which must be read in connection with other parts of the charge describing how persons other than the one who actually committed or attempted the abortion may become criminally involved. We think the charge fully and correctly informed the jury on this point, particularly with the additional information given to it following this objection.

Defendants' other objection to the charge, in relation to the testimony of Dr. Hart, concerns the failure of the trial judge to describe the doctor's conclusion after examination as an opinion and not a fact. In view of the other parts of the charge placing credibility of the witnesses and the weight of the evidence in the hands of the jury to resolve, and the further fact that no specific exception was taken and no request made on this point, we conclude that it was not fundamental error, if error at all, as to be covered by a general exception. Defense counsel objected to the doctor giving his opinion, but not to the charge as to the effect. We have previously discussed his objections to the evidence.

The objection to the charge as it relates to the testimony of Barbara Perry concerns the failure of the trial judge to limit her testimony to the question of intent. No request was made for such an instruction. In fact, no mention of the testimony of this witness was made in the charge. Inadequacy of instruction is insufficient. A party may not

remain silent and take his chances on a verdict and then, if it is adverse, complain of mere inadequacy which could have been corrected. Koenig v. Flaherty, 383 Pa. 187, 117 A. 2d 719. We do not conclude the inadequacy in this case to be fundamental.

It is further contended that the sentence imposed upon appellant Lang was incorrect. The court sentenced the appellant, Charles William Lang, to undergo imprisonment in the York County jail for a period of eight months, and to pay the costs of prosecution.

The Penal Code on Abortion, Act of June 24, 1939, P. L. 872, § 718; 18 P. S. 4718 provides that a defendant:

> ". . . upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate and solitary confinement at labor not exceeding five (5) years, or both."

The Act of June 19, 1911, P. L. 1055, as amended, 19 P. S. § 1057 provides:

> "Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a State penitentiary, shall be sentenced to imprisonment therefor in any penitentiary or other institution of this State, or in any county or municipal institution, the court, instead of pronouncing upon such convict a definite or fixed term of imprisonment, shall pronounce upon such convict a sentence of imprisonment for an indefinite term: Stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense; and the minimum limit shall never exceed one-half of the maximum sentence prescribed by any court:"

The appellants contend that the maximum sentence that could be imposed on Lang legally was a sentence of four to eight months. The maximum sentence in an inde-

terminate sentence is the real sentence. Commonwealth ex rel. Monaghan v. Burke, 169 Pa. Superior Ct. 256, 82 A. 2d 337. The lower court had the right under the statute to sentence appellant Lang up to eight months, and since this is the real sentence there is no reason why the judgment should be reversed. However, since the Penal Code makes the crime of abortion subject to imprisonment by separate or solitary confinement at labor, or fine, or both, the sentence should have been an indeterminate one. Where the original sentence is illegal or erroneous we may remit the record to the lower court for proper sentence, and that court may proceed to sentence the defendant anew in proper form and according to law. Commonwealth v. Downer, 161 Pa. Superior Ct. 339, 53 A. 2d 897. Commonwealth ex rel. Monaghan v. Burke, supra.

The judgments of sentence of Charles Christopher Campbell and Thelma Adele Ensor are affirmed and they are ordered to appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with their sentences or any part thereof that had not been performed at the time the appeal was made a supersedeas.

The judgment of sentence of Charles William Lang is affirmed and it is directed that the record be remanded to the Court of Oyer and Terminer of York County for correction of the sentence to include a minimum and the defendant, Charles William Lang, is ordered to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with his sentence or any part thereof that had not been performed at the time the appeal was made a supersedeas.

APPENDIX C.

Opinion and Order of the Court of Oyer and Terminer of York County [Appeals Nos. 32, 33, 34].

In these three cases the defendants were separately indicted under Section 718 of the Act of 1939, P. L. 872, 18 P. S. 4718. Each bill of indictment was drawn in three counts. The first count charged that the defendant did unlawfully, wilfully and feloniously administer certain women supposed to be pregnant a certain drug and substance with intent to procure the miscarriage of the women mentioned in the indictment. The second count charged that the defendant did unlawfully, wilfully and feloniously administer to the same named women certain poison drugs and substance with intent to procure a miscarriage of the women, and the third count alleged that the defendants did unlawfully, wilfully and feloniously use a certain instrument and means, the nature of which instrument and means was unknown, upon the women with the intent to procure miscarriage of them. The charges in each of the indictments are identical.

The three cases were tried together before a jury, and in each case the jury returned a verdict of not guilty as to the first and second counts of each bill, and a verdict of guilty as to the third count in each bill. Motions for new trial and arrest of judgment in the case of each defendant have been filed, and duly argued. The motions are identical in each case, containing the usual reasons that the verdict was against the evidence, that the verdict was against the weight of the evidence, and the verdict was against the law. The fourth reason is given in each instance wherein objection is taken to the admission of certain evidence. The same reasons are alleged in the motions for new trial and in the motions for arrest of judgment.

The Commonwealth presented all of the evidence that was offered in the case. All three defendants elected not to testify nor to offer any other evidence on their behalf.

From the verdicts it can be said that the jury found the following factual situation. That some time during the months of August or September of 1958 the defendants Campbell and Ensor approached P. L. Diehl, a real estate broker operating in the City of York, for the purpose of renting a house and lot of ground in Heidelberg Township, York County, Pennsylvania, representing themselves as Carrol G. Harrison and Orta Harrison. After some negotiation with Mr. Diehl, these two defendants entered into a lease for the property and entered into possession thereof.

On the evening of November 21, 1958, the Pennsylvania State Police, armed with a search warrant, stationed themselves near the house and first observed two automobiles, one a Cadillac and one a Ford, drive up to the house. The occupants of the Cadillac entered the house and remained there. The Ford left after discharging its passengers, who also entered the house, and about an hour later returned, at which time at least two women and the driver left the car and went into the house. A few minutes after these people entered the house the State Police entered by using a key which they had previously obtained from the owner of the premises, and upon entering they observed the defendant Campbell sitting on a stool in a room beside a table similar to that used by medical doctors for patients to lie upon during examinations and minor surgical procedures, dressed in a white gown; a white surgeon's cap; a pair of rubber gloves were on his hands, and a surgeon's mask was tied around his face. The defendant Ensor was found in the bathroom in the act of unbuttoning a white uniform similar to that worn by nurses, apparently preparatory to removing the uniform. The defendant Lang was found sitting in a chair in ordinary street clothes in a room referred to as a living room. In three other rooms there was

found a bed in each room occupied by a woman, and in another room was found another woman dressed only in a slip. In the room where the defendant Campbell was seated in addition to the table above mentioned, there were various surgical instruments, kidney pans such as are found in medical offices and hospitals, packages of sterile gauze and certain drugs and many other items that are normally found where medical practices are engaged in.

The officers spoke with defendant Campbell as well as defendant Ensor. All three defendants were taken to the State Police Barracks, all of the items found in the house were catalogued by the police and tagged with identification markers. The three girls who were found occupying the beds were taken to the office of Dr. Thomas Hart where they were examined by him. His examination disclosed that two of the girls showed evidence of surgical procedures in the region of the reproductive organs, and that these two girls had had inserted into the uterus a tampon about five or six inches in length and about one-half to three-quarters inch in diameter. The third girl was examined, but this examination disclosed no evidence of surgical procedure having been followed in her case. The fourth girl it developed had consulted Dr. Hart as a private patient some time prior to this, at which time she had given him an incorrect name to indicate that she was married, when in fact it later developed she was not married. At that time he had diagnosed that she was in a pregnant condition, that when she entered the premises she was asked by the defendant Ensor how long she had been pregnant, to which she replied about three months, that the defendant Ensor then instructed her to remove all of her clothing except the slip and administered a shot of some kind with a hypodermic needle in her leg. The defendants were all interrogated at the State Police Barracks later that evening, at which time the defendant Campbell signed a written statement in which in substance he said he had been performing surgical procedures upon women for the purpose of induc-

ing abortion or miscarriages and that he received a fee of $200.00 for each operation. The defendant Ensor in a verbal statement to the police said that she was employed by Campbell and that she had had training as a practical nurse, and that her duties were to administer to the general needs of the girls who came to the house. The defendant Lang said that he had heard that defendant Campbell had been performing abortions, that he was employed by Campbell to work on his farm, and that on the particular evening in question he had been instructed by Campbell to go to a drive-in eating place located along the Lincoln Highway a few miles west of York to pick up a woman, and to pick up another woman at a tavern located a few miles from the house in Heidelberg Township, and to transport these two women to the house, and to use back country roads in going to the house.

Certainly if the jury believed this testimony, which from the verdict it is evident they did, there was ample evidence from which they could find all three of the defendants guilty of the third count in these bills of indictment.

In his brief, counsel for the defendants discusses a number of questions, contending that errors were committed in the admission of certain evidence. I shall discuss these in the order raised in the brief.

The first question relates to the admission of many of the exhibits that were offered in evidence. He makes a general objection to the volume of the exhibits, and secondly to the fact that many of the exhibits represented simple household items that would normally be found in almost any private dwelling. While it may not have been necessary for the Commonwealth to introduce all of these exhibits, we do not feel that the defendant was unduly prejudiced thereby, particularly in the light of his very frank confession that he had been engaged in this nefarious conduct, so far as the defendant Campbell is concerned and also in the light of the statements made by the other two defendants which indicated clearly that they were a part and parcel of the whole

operation. Specific objection is made to one photograph which was offered. The photographer for the State Police snapped a picture of the defendant Campbell seated on the stool beside the table that is referred to in the testimony throughout as the "operating table" wearing the costume hereinbefore described. After this picture was snapped, he asked Campbell to pull the surgical mask up over his face so that it would be in the same position it was when the officers first entered the premises, he having in the meantime pulled it down below his face and had it tied around his neck. He did this, and the photograph was snapped so that he would appear as he did when the officers entered except for the fact that at the time of their entry he was wearing the rubber gloves, but at the time this second photograph was taken he had removed the rubber gloves and they were lying on the table beside him.

Counsel contends that this constituted a re-enactment of the crime which unduly prejudiced the defendant Campbell, and relies for his authority on the *Com. v. Johnson*, 368 Pa. 139. There, Johnson was charged with murder wherein the death resulted from a train wreck caused by his tampering with the rails of the railroad. Some six months after the accident occasioned by his tampering he was apprehended in South Carolina and returned to Pennsylvania and taken to the spot where he had tampered with the railroad tracks, at which time two photographs were taken, one showing him pointing to the place on the rail where a section of it had been removed, and another showing him pointing to the window of a tool shed. The court without referring to any prior decisions, did say in this case that these photographs were improper. "We do not think that the instant case is similar to that one because here the photographs were taken very shortly after the officers had entered the premises and found Campbell seated in the spot where the photograph was taken and the evidence indicates he had remained in this spot all the time up until the taking of the photograph and that the only thing the police asked

was that he manipulate the surgical mask into the position that it was at the time they originally entered the premises. We think that this clearly comes within the ruling of the Supreme Court in *Com. v. Carelli*, 281 Pa. 602. This was a murder case where the killing had taken place in a saloon. Some time later, it does not appear how much later, the police took the defendant and his fellow criminals to the saloon where they were asked to take the same position they occupied at the time of the murder, and photographs were taken. Mr. Justice Simpson said of this: "Objections made to the admission of photographs of the saloon where the murder was perpetrated on the ground they were taken nearly a month after the date of the crime must necessarily fall because they were taken when the defendant and his fellow criminals were themselves showing how the crime was committed in order that the photographer should get an exact reproduction of the saloon and of the location of the parties in it at the date of the murder." We find no error in the admission of this photograph.

With regard to the contention that many of the exhibits consisted of what might be termed ordinary household items, it might be said that although these items were in many instances such as would be found in a normal household, they were also things that very logically would be found in a place where the business of the defendants was being operated such as sheets, pillow cases, blankets, Kleenex and things of that nature. Furthermore, there is no evidence that this property at that time was being used for anything other than the performance of the conduct charged to the defendants. Not a scintilla of evidence was introduced to show this house was used for any normal living purposes.

Counsel then complains that he was not permitted to cross-examine Sergeant Robert Smith of the Pennsylvania State Police as to the source of the information which he had received and which formed the basis of the affidavit he signed in order to obtain the search warrant. He argues

that this should have been permitted in order to show bias or prejudice on the part of the officer. It is not quite clear to the court how the obtaining of a search warrant would show bias on the part of the officer obtaining it, particularly when the officer did testify that he took this action on the complaint of the owner of the property who told him that there seemed to be something going on at the house that was not right. We do not know what other additional information Sgt. Smith may have had, but counsel is very vague in his statements as to how he considered that any alleged irregularity in the obtaining of the search warrant would affect the credibility of the officer's testimony when describing what he found after he entered the premises. Even though the search warrant may have been improper in the first instance, the evidence obtained thereunder would not be subject to objection. *Com. v. Giambrone*, 183 Pa. Super. Ct. 283.

The next objection refers to the admission of the testimony of Barbara Perry. She is the young lady who had consulted Dr. Hart prior to the time of this raid and learned from him that she was pregnant, and also found on the premises that evening. She testified she had gone there for the purpose of being relieved of her pregnancy, and while there is no evidence that she did see the defendant Campbell, she was transported there by the defendant Lang and almost immediately upon her arrival was asked by the defendant Ensor how long she had been pregnant and was instructed by her to remove most of her clothing, and was administered a shot. The evidence clearly discloses the facts from which a jury could find that a conspiracy existed among the three defendants to commit acts of abortion, and certainly the testimony of this girl would be admissible as against all three defendants because it showed acts of at least two of the defendants that were clearly in the furtherance of the unlawful combination and was therefore binding upon all three defendants. The defendants' counsel contends that this testimony tends to show evidence of the

commission of a crime other than that for which the defendant was indicted. There is no question that the crime of abortion was not committed upon this young lady but the evidence is adimissible for the reason above stated, and also could be considered admissible under the principle that evidence showing the commission of other crimes close in the point of time may be received to show the state of mind of the defendant at the time he committed the principal offense. He also objects to the testimony of Dr. Hart on the ground that it constituted expert testimony concerning facts that did not lend themselves to expert evidence. In the first place, while some of Dr. Hart's testimony did require a knowledge of medicine, he was not testifying in the case simply as an expert, but was testifying as to what he himself found upon making a physical examination of the women who were found in the premises at the time the officers got there. His whole testimony consisted of a description of the condition of these women. It is true that he did express certain opinions based on what he himself found, which of course he was clearly competent to do. We find no merit in this objection and counsel has cited no case similar to the problem raised by Dr. Hart's testimony.

He also objects to the refusal of the court to permit Dr. Hart to be cross-examined relative to an asserted hypothetical situation. This developed from a question by defense counsel to the doctor as to whether or not it would have been physicaliy possible for the two women to have inserted the tampons into their own bodies. Dr. Hart expressed his very firm opinion that this act would not have been possible to have been performed by the women themselves in the manner in which it had been done. During this cross-examination, the doctor did make a remark to the effect that no woman in her right mind would do this, even if it were physically possible. Defense counsel then offered to further cross-examine the doctor on whether or not a woman not in her right mind might do this. This the court refused to permit, mainly because there was no evidence

whatsoever that either of the women in question were not in their right minds, and we certainly see no error in excluding this kind of hypothetical testimony.

The defendant also complains that the court did not sustain his demurrers to the evidence. If there was any error in refusing to sustain the demurrers as to the first two counts in the bills of indictment, that has been cured by the jury's verdict. It requires only a brief summary of the testimony that was offered to show clearly that the jury was eminently proper in returning the verdict they did as to the third count in the bill of indictment so far as the defendant Campbell was concerned, at least. The testimony raised a question of fact with regard to the other two defendants, and the testimony, if believed by the jury, certainly justified the verdict, and it would have been clear error to have refused to permit the jury to pass upon this evidence.

Lastly, the defendant contends that the court should have instructed the jury that the testimony of Nancy Lou Reese had she been called, would be presumably adverse to the Commonwealth. She is one of the three girls who were found in the beds in the house at the time of the raid. The evidence showed that she had been a resident of Maryland and that the Commonwealth did a week or two before the trial, make an effort to try to locate her and in fact had at least a week prior to the trial sent a subpoena to the Sheriff at Baltimore County Maryland, where she had lived, according to the information available to the Commonwealth, and that the Sheriff of Baltimore County returned the subpoena with the information that this witness could not be located. The defendant contends that the Commonwealth should have gone to greater effort to locate her. He cites no cases or authority in support of this contention. The evidence does not disclose she was in any way under the control of the Commonwealth. Therefore, under the circumstances the defendant was not entitled to this instruction. We did give him the benefit of the doubt and did so instruct the jury with regard to the testimony of the other two women who

were found in the beds, because the Commonwealth did have information from the Sheriff of Baltimore County that the subpoenas they forwarded to him had been served upon these other girls but the Commonwealth did not take any steps to compel the attendance of these witnesses under the Uniform Attendance of Witnesses Act which is in effect both in Pennsylvania and Maryland. We think that we went pretty far in favor of the defendant in informing the jury that they could consider the testimony of these two witnesses to be adverse to the Commonwealth had they testified.

We find no reason to either grant a motion for a new trial or a motion in arrest of judgment in these cases, and we therefore enter this

Order [Appeals Nos. 32, 33, 34].

And Now, to Wit, this 24th day of April, 1961, it is ordered, adjudged and decreed that the motion for new trial and arrest of judgment both be and are hereby overruled and dismissed, and the defendant is directed to appear before this court on Monday, May 15, 1961, at 9 o'clock A. M. EST, for the imposition of sentence.

An exception is granted to the defendant to the action of the court in this regard.

By THE COURT,

George W. Atkins, *P. J.*

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IN THE

Supreme Court of the United States

October Term, 1961
No. [redacted] 113

CHARLES CHRISTOPHER CAMPBELL,
CHARLES WILLIAM LANG and
THELMA ADELE ENSOR,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for a Writ of Certiorari to The Supreme Court of Pennsylvania

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA

DANIEL W. SHOEMAKER,
District Attorney,
York County,
JOHN T. MILLER,
First Assistant District Attorney,
LEWIS H. MARKOWITZ,
Assistant District Attorney,
EARL R. DOLL,
Assistant District Attorney,
Counsel for Respondent.

Court House
York, Pennsylvania

Murrelle-Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 961 October Term, 1961

Charles Christopher Campbell, Charles William Lang and Thelma Adele Ensor,
Petitioners

v.

Commonwealth of Pennsylvania

On Petition for a Writ of Certiorari to
The Supreme Court of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

OPINIONS BELOW

The Supreme Court of Pennsylvania on February 13, 1962, denied an allowance of an appeal to the Petitioners from an opinion of the Superior Court of Pennsylvania as reported in 196 Pa. Superior Court 386, 175 A. 2d 324 (1961).

JURISDICTION

Jurisdiction, as stated in Petitioners' Brief, is under 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Stated in Petitioner's Brief.

QUESTIONS PRESENTED

As stated in Petitioners' Brief.

STATEMENT OF THE CASE

The case as stated in Petitioners' Brief is substantially correct. However, defense counsel at no time questioned the legality of the search warrant. Regarding the search warrant, defendant's counsel stated, "I am not questioning the validity of it now. I am attempting to show bias and prejudice on the part of this witness." (66a) As a matter of fact, the Commonwealth of Pennsylvania offered to show probable cause for issuance of the search warrant. Defense counsel at the time contended it was "not the issue".

ARGUMENT

The first question is whether or not the search warrant which was the basis of the arrest was proper.

It is conceded that the Complaint and the search warrant based thereon would be handled differently since the decision of *Mapp vs. Ohio*, 367 U.S. 643, yet there is little in the facts of the present case to grant the Petitioners' request. Even the facts are much different than in the case of *Mapp v. Ohio*. In that case there was serious doubt as to whether a search warrant had been issued, and if it had, there was no question that it had not been issued for the evidence which was obtained.

In the present case, there was a Complaint for a search warrant; a search warrant issued for a search of abortion instruments, exactly the type of instruments found during the search. Defense counsel did not object to illegality of the search warrant; he objected to the fact that the officer may have been biased or prejudiced in obtaining the warrant. Even assuming the officer was biased or prejudiced this would not be fatal to the proceedings, so long as he acted properly. The Commonwealth of Pennsylvania offered to show probable cause for the issuance of the search warrant; however, defense counsel conceded that was not the issue.

The search which netted exactly the type of instruments as described in the search warrant certainly indicates probable cause did exist and that at that time

the Commonwealth of Pennsylvania was in a position to prove probable cause did in fact exist. Nothing in the case indicates any illegality in the issuance of the search warrant. The law of search and seizure as it existed at the time of trial was properly ruled upon by the judge.

Should the case of *Mapp v. Ohio*, supra, be applied retrospective and, as a practical matter if it is retrospective, where does the retrospective effect cease? The constitutional purpose of *Mapp v. Ohio* is to prevent the use of evidence seized by an illegal search and seizure. The decision does not make the law retrospective, and consequently, if the Court had wanted this new rule to be retrospective in application, it would have so specified in clear and unmistakable terms. It is somewhat apparent that the *Mapp v. Ohio* decision is one of deterrence. That is, it is a guide for proper police methods. There is nothing in the record to indicate it is to be retroactive. Instead, the Court uses language indicating that it is prospective. Note the following from *Mapp v. Ohio*:

> "*Presently*, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may . . .
>
> "If the fruits of an unconstitutional search *had been* inadmissible in both state and federal courts, this inducement to evasion (the use of those 'fruits' in a state prosecution), would have been sooner eliminated.
>
> "Federal-state cooperation in the solution of crime under constitutional standards will be pro-

moted, if only by recognition of their *now* mutual obligation to respect the same fundamental criteria in their approaches.

"Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states . . . we can *no longer* permit that right to remain an empty promise."

In *Griffin v. Illinois,* 351 U.S. 12 at page 25, the Court stated the following concerning new principles as enforced by the Supreme Court of the United States: "for sound reason law generally speaks prospectively". This is a sound and most sensible rule inasmuch as confusion, consternation and chaos would result if new and controlling principles of law would be applied retroactively. Retroactivity of the new rule would certainly open the floodgates of litigation, both civil and criminal, and petitioners will swamp the courts with unprecedented appeals.

The facts in the present case manifest this very clearly. These defendants are now objecting to legality of a search warrant which by inference they admitted at the trial was legal. This they are pleading on the *Mapp v. Ohio* decision. This is a clear indication of the extreme cases which would appear before all the courts should the *Mapp* decision be applied retroactively. Only a prospective application of the rule will permit fairness and justice to all. Any retroactive application of the new principle will be unwise and cannot be fairly administered and applied.

The second question Petitioners argue is a question of fact. The jury below on the evidence produced

by the Commonwealth found the defendants guilty as charged. Two witnesses who were duly subpoenaed by the Commonwealth did not honor the same, being nonresidents at the time. A third witness could not be located, yet, strangely, after conviction of defendants all three offered affidavits TO THE DEFENSE in support of a new trial.

As the Pennsylvania Superior Court stated in its decision:

> "The Commonwealth is not obligated to call all eyewitnesses, in a criminal prosecution, nor a particular eyewitness, where the District Attorney has reason to believe the eyewitness is unreliable."

The defense at all times was fully aware prior to trial and at the trial that the Commonwealth would not produce the witnesses if they did not honor the subpoenas. The trial court gave a favorable charge to the defense concerning the witnesses. The Commonwealth of Pennsylvania, nevertheless, was able to prove beyond a reasonable doubt the guilt of these defendants. As the Superior Court of Pennsylvania stated in its opinion on this case:

> "Aside from the statements of the defendants, other evidence presented by the Commonwealth shows unequivocally that two abortions, or attempts to commit two abortions, had taken place."

From this record it is apparent that defendants have little to complain about concerning the missing witnesses.

The Petitioners state that the due process will not permit a conviction to stand on the basis of the

evidence which does not support the charge in the indictment, even if the evidence shows the existence of another crime not charged, citing *Stironi v. U. S.*, 361 U.S. 212. But in that case evidence of a crime not charged in the indictment was allowed. Certainly, in the present case, the indictment charges abortion and the evidence proved abortion. In the *Stironi* case, supra, the indictment charged the defendant with interfering with interstate commerce by obstructing the movement of sand. The proof offered also showed the obstruction of the moving of steel in interstate commerce. Certainly, this type of case cannot control the case now before the Court.

Under the circumstances and on the facts involved the Petition for Writ of Certiorari should be denied by the Court.

Respectfully submitted,
DANIEL W. SHOEMAKER,
District Attorney.
JOHN T. MILLER,
First Assistant District Attorney.
LEWIS H. MARKOWITZ,
EARL R. DOLL,
Assistant District Attorneys.
Counsel for Respondent.

Court House
York, Pennsylvania.

APPENDIX

COMPLAINT FOR SEARCH WARRANT

(Copy)

Before me, the subscriber, one of the Aldermen, in and for said County, personally came ROBERT SMITH, PENNA. STATE POLICE of the CITY of HARRISBURG in said county, who upon HIS solemn OATH according to law, saith that FROM INFORMATION RECEIVED WHICH HE BELIEVES at the TOWNSHIP OF HEIDELBERG in the County, aforesaid, THAT THERE IS JUST CAUSE TO SUSPECT THAT ARTICLES AND INSTRUMENTS TO PROCURE ABORTIONS ARE POSSESSED, AND HE HAS JUST CAUSE AND PROBABLE CAUSE TO BELIEVE AND DOES BELIEVE IN A ONE STORY CONCRETE BLOCK RANCH TYPE BUILDING AND LOCATED A SHORT DISTANCE FROM SMITH'S GREEN HOUSES, SHORT DISTANCE FROM TOWNSHIP ROAD T319 AND BEING IN CONTROL OF CARROLL G. HARRISON ALSO KNOWN AS CHRISTOPHER COLUMBUS CAMPBELL AND ALSO KNOWN AS CHARLES C. CAMPBELL.

AFFIANT THEREFORE PRAYS THAT A SEARCH WARRANT MAY ISSUE TO A PROPER OFFICER DIRECTING HIM TO SEARCH SAID PLACE, THING OR THINGS.

ALL THIS IS CONTRARY TO THE ACT OF THE GENERAL ASSEMBLY IN SUCH CASE MADE AND PROVIDED AND AGAINST THE PEACE AND THE DIGNITY OF THE COMMONWEALTH OF PENNSYLVANIA.

ROBERT SMITH

Sworn and subscribed to before me this 21st., day of NOVEMBER, 1958.

H. Gellard Fickes
Alderman.

(Seal)

Same day Warrant issued to Constable

SEARCH WARRANT

(Copy)

Commonwealth of Pennsylvania
County of York, ss:

TO ANY PENNSYLVANIA STATE POLICEMAN IN SAID COUNTY, GREETINGS:

WHEREAS, information and complaint have this day been made to the undersigned authority, an Alderman in and for the City of York, County of York and within the Commonwealth of Pennsylvania, on the oath of Corporal Robert Smith, of the Pennsylvania State Police, Harrisburg, Pennsylvania, that there is just cause to suspect that articles and instruments to procure abortions are possessed in a place described as a one story concrete block, ranch type building and

located a short distance from an establishment known as Smith's Green Houses and also a short distance from Township Road T-319, in Heidelberg Township, York County, Pennsylvania, and being rented by, and in the control of Carroll G. Harrison, also known as Christopher Columbus Campbell, and also known as Charles C. Campbell. These are therefore to command you to make diligent search in the building heretofore described, any parcel thereto, out buildings and conveyances for the articles, devices or instruments to procure abortions and if you find same or any part thereof, that you secure same and bring the person or persons in whose custody you find same before our said Alderman or some other member of the Minor Judiciary to be duly examined concerning the premises and further be dealt with according to law. Witness, our said Alderman in the City of York, County of York and within the Commonwealth of Pennsylvania, who hath hereunto set his hand and seal this 21st. day of November, 1958.

H. Gellard Fickes,
Alderman

Copy made this 8th day of October 1962.

H. Gellard Fickes,
Alderman
Fickes Way &
229 E. Phila. St.,
York, Pa.

My Commission Expires Jan. 1, 1968.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 113.

CHARLES CHRISTOPHER CAMPBELL, CHARLES WILLIAM LANG and THELMA ADELE ENSOR,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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Philadelphia 2, Pa.,
STANFORD SHMUKLER,
POPLOW AND SHMUKLER,
905 Robinson Building,
Philadelphia 2, Pa.,
Attorneys for Petitioners.

International, 711 So. 50th St., Phila. 43, Pa.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners hereby petition this Honorable Supreme Court for a rehearing of their Petition for a Writ of Certiorari. The present petition is filed under the provisions of Rule 58(2) of the Revised Rules of the Supreme Court of the United States.

On November 13, 1962, this Court denied petitioners' Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

They now petition the Court to rehear their original petition and to reconsider the order of denial of this case for substantial reasons not previously presented, and not in the record of this case nor available to the petitioners until the filing of the Brief for the Commonwealth of Pennsylvania on or about October 30, 1962.

ADDITIONAL QUESTION TO BE DECIDED.

Where the record on appeal shows that a search warrant was invalid on its face, but where the case was tried prior to this Court's decision in *Mapp v. Ohio*, and the State Appellate Courts refused to review the validity of the search warrant, were petitioners deprived of due process of law guaranteed by the Fourteenth Amendment?

ADDITIONAL REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

At the time the Petition for Writ of Certiorari was filed in this case, it was specifically noted that "the warrant does not appear in the record, and it is not shown whether the warrant authorized a search in the nighttime or was restricted to the daytime, nor is the scope of the warrant disclosed." Petition for Writ of Certiorari, page 4.

In the Commonwealth's Brief, filed in opposition to the petition, the complaint and search warrant were for the first time put in the record of this case. Brief for Commonwealth of Pennsylvania, pp. 9 to 11. This Court's decision denying certiorari was rendered before petitioners had an opportunity to file a reply brief. However, it appears from the face of the complaint and warrant, thus put into the record by the Commonwealth, that the complaint and warrant are defective for the following reasons:

1. The Complaint Does Not State That There Was Reason to Believe the Articles Would Be Used Illegally.

Pennsylvania law does not prohibit the possession of instruments which could be used for the purposes of performing abortions. In fact, a law prohibiting such possession would undoubtedly be unconstitutional, since there are many drugs, substances or instruments which could be used for abortion purposes, which are also normally used for many proper legal purposes. Under such a law, every doctor, druggist and even housewives could be considered possessors of illicit instruments. Likewise, not all abortions are unlawful; clearly, abortions induced for medical reasons may be completely lawful.

The complaint for the search warrant, set out by the Commonwealth, states only "that there is just cause to suspect that articles and instruments to procure abortions are possessed . . ." This does not charge that there is any probable cause to suspect that the articles and instruments are intended to be used unlawfully or to commit unlawful abortions. The warrant itself follows this language, and thus does not correct any defect. Such a warrant could be thus utilized for the search of any drugstore, doctor's office or even any kitchen, bathroom or room containing a medicine cabinet.

In this Court's decision in *Mapp v. Ohio,* 367 U. S. 643 (1961), this Court concluded that the exclusionary rule enunciated in the Fourth Amendment is applicable under

the Fourteenth Amendment to protect citizens from invasions by State officials. It has long been held in the Federal Courts, and specifically recognized in the Federal Rules of Criminal Procedure, that search warrants cannot be used for general exploratory searches, nor for the disclosure of merely evidence, but may be issued only to search for and seize property (1) stolen or embezzled in violation of the law (fruits of a crime), (2) designed or intended for use or which is or has been used as the means of committing a criminal offense (instrumentalities of a crime), (3) contraband, or (4) weapons. See, *e.g., United States v. Lefkowitz,* 285 U. S. 452 (1922); *Gouled v. United States,* 255 U. S. 298 (1921); Federal Rules of Criminal Procedure, Rule 41. Here, the complaint and warrant set forth in this record are not directed towards the search for and seizure of fruits of a crime, instrumentalities, contraband or weapons; they are directed at objects which could be innocent and lawfully used, since there is no allegation to the contrary.

Accordingly, the complaint and warrant are defective on their face, as appears from the record presently before this Court. There was no way for petitioners to develop this at any prior stage of the proceedings.

2. The Complaint and Warrant Did Not Justify Nor Authorize a Nighttime Search.

The affiant swore in the complaint for search warrant, appearing on p. 9 of the Commonwealth's Brief in opposition, that "from information received which he believes, at the Township of Heidelberg, in the County, aforesaid, that there is just cause to suspect that articles and instruments to procure abortions are possessed, and he has just cause and probable cause to believe and does believe, in a one story concrete block, ranch type building . . . ." It is thus apparent from the face of this complaint that the affiant had no personal knowledge of the facts set forth therein, and he was not positive that the items were located at the place designated.

The search warrant, appearing on pp. 10-11 of the Commonwealth's Brief, states ". . . There is just cause to suspect that articles and instruments to procure abortions are possessed in a place described as a one story concrete block, ranch type building. . . . These are therefore to command you to make diligent search in the building heretofore described, any parcel thereto, outbuildings and conveyances for the articles, devices or instruments to procure abortions. . . ." Thus, the search warrant itself is issued without any showing that the information is positive, and it does not restrict the search to the daytime. As a matter of fact, as appears from the record of this trial, the warrant was served in the nighttime (70a).

The Federal Courts have long recognized that nighttime intrusions into the privacy of citizens are to be condemned. In order to implement this condemnation, the Federal Rules of Criminal Procedure specifically require for the issuance of a nighttime warrant that the affidavits be positive that the property is on the person or in the place to be searched. Federal Rules of Criminal Procedure, Rule 41(c); see *Jones v. United States*, 357 U. S. 493 (1958).

Thus, the Fourth Amendment to the Constitution, as implemented by the Federal Rules, declares that any search in the nighttime is unreasonable unless there is a search warrant based on an affidavit that illicit property is positively located upon the premises to be searched. Although there were not, at the time of this trial, any Rules of Procedure in Pennsylvania specifically setting forth the procedures to be followed in the issuance or execution of search warrants, since this Court's decision in *Mapp v. Ohio* such evidence should not be admitted in the Pennsylvania courts.

In the case at bar, it did not appear of record until the Commonwealth filed its Brief that the affidavit was not positive and that the search warrant did not specifically authorize a nighttime search. Therefore, on the affidavit and warrant appearing in this record, only a search in the

daytime could be sustained. Accordingly, petitioners were deprived of due process by the admission into evidence against them of property seized under this warrant.

CONCLUSION.

In the case *sub judice*, the Superior Court of Pennsylvania refused to apply this Court's decision in *Mapp v. Ohio*, since the petitioners had not shown at their trial conducted prior to *Mapp* any illegality in obtaining the search warrant. It is respectfully submitted that the complaint and search warrant put into the record by the Commonwealth in its Brief in opposition to the petition filed in this Court for writ of certiorari clearly demonstrate the illegality in the issuance and execution of the search warrant. This, it is respectfully submitted, is a substantial ground for this Court to review the convictions below, not previously presented in this Court for the reasons set out herein.

Respectfully submitted,

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POPLOW AND SHMUKLER,
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Attorneys for Petitioners.

I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay, and that the petition is restricted to the argument of substantial grounds not previously presented.

STANFORD SHMUKLER.